No. 87-1296

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

IN RE EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY, AND TENNECO RESINS, INC.,
Petitioners.

On Petition For A Writ Of Mandamus To The Supreme Court Of New Jersey

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REPLY BRIEF FOR PETITIONERS

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Respondents acknowledge that the state court has denied petitioners a refund of preempted taxes, and principally argue that this Court should await further proceedings before considering whether the state court has acted in conformity with the mandate. This argument misstates the precedents governing compliance with the Court's mandate. Moreover, to the extent they respond to the substance of our argument, respondents fail to recognize that CERCLA prohibited the imposition of certain taxes, rather than expenditures, by the states.

1. We demonstrated in our petition (pages 7-8) that this Court has consistently held that mandamus is the appropriate remedy, in aid of its appellate jurisdiction, to correct a lower court's violation of this Court's mandate.

Respondents virtually ignore the settled precedents supporting this proposition. Instead, they rely (Br. in Opp. 11-14) on cases addressing the entirely different question whether mandamus can be used to review an unappealable interlocutory order where no issue of compliance with an appellate mandate was presented.[1] Respondents also rely on cases holding that this Court does not have jurisdiction under 28 U.S.C. § 1257 to review nonfinal judgments of state courts,[2] but this proposition is irrelevant to this Court's jurisdiction under the All Writs Act, 28 U.S.C. § 1651. *See, e.g., Deen* v. *Hickman*, 358 U.S. 57 (1958); *Bucolo* v. *Adkins*, 424 U.S. 641 (1976), in which this Court has used mandamus as a vehicle to correct a state court's violation of the mandate without requiring that the judgment be final within the meaning of Section 1257. In the one case cited by respondents that even arguably is on point, *Ex parte Texas*, 315 U.S. 8 (1942), the Court refused the writ because the lower court was in compliance with the mandate, not because the writ was unavailable.

No prudential concerns justify delay in correcting the New Jersey Supreme Court's violation of this Court's mandate. The further proceedings by the Tax Court contemplated by the New Jersey Supreme Court's decision, which will entail lengthy and ultimately irrelevant analysis of millions of dollars of expenditures (Br. in Opp. 13), are premised solely upon its erroneous view that this

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[1] *See Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) (mandamus not available to correct district court order striking pleas in abatement in criminal case); *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33 (1980) (mandamus not available to review district court order granting new trial); *Will* v. *United States*, 389 U.S. 90 (1967) (mandamus not available to vacate pretrial order in criminal case). The Court in *Will* recognized that mandamus is appropriate "to confine a lower court to the terms of an appellate tribunal's mandate." *Id.* at 95-96.

[2] *See Minnick* v. *California Dep't of Corrections*, 452 U.S. 105 (1981); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948).

Court's decision in *Exxon* v. *Hunt*, 475 U.S. 355 (1986), interpreted Section 114(c) of CERCLA as preempting expenditures, not taxes. Because "reversal of the State court on the federal issue would be preclusive of any further litigation" in the Tax Court, immediate review is warranted. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). *See also, id.* at 479 ("[t]he federal issue is conclusive"); *id.* at 480 ("[t]he federal issue . . . will survive and require resolution regardless of the outcome of the future state-court proceedings").

Finally, respondents' argument that "exceptional circumstances" are necessary to justify granting mandamus to confine a lower court to this Court's mandate (Br. in Opp. 15-17) simply collapses to the merits—whether or not the New Jersey Supreme Court violated the mandate in *Exxon* v. *Hunt*. That violation provides the "exceptional circumstances" supporting issuance of the writ.

2. Our petition showed (pages 8-13) that the New Jersey Supreme Court violated the mandate, as well as the plain language of Section 114(c) of CERCLA, by looking to expenditures, rather than the tax itself. This led it to the further errors of delaying preemption for almost three years after Section 114(c) became effective and of relying on the subsequent repeal of Section 114(c), as well as equitable principles, to design a remedy that made the Spill Fund "whole" rather than refunding illegally collected taxes to petitioners.

Section 114(c) plainly prohibits the exaction of certain taxes: "[N]o person may be required to contribute to any fund, the purpose of which is to pay compensation. . . ." Thus, this Court characterized the issue in this case as whether Section 114(c) "forbids state taxation of the type the Spill Act imposes," 475 U.S. at 362, and it held that Section 114(c) prohibited the imposition of taxes motivated by improper purposes, *id.* at 375.

Because this Court found that the New Jersey tax was prompted, in part, by preempted purposes, its mandate

rested on the rationale that "state legislation is invalid 'to the extent that it actually conflicts with federal law. . . .'" 475 U.S. at 376. Specifically "declin[ing] the dissent's invitation" to uphold the tax "in its entirety because a substantial portion of its purposes are permissible," this Court instead remanded for a determination "whether, or to what extent, the non-preempted provisions of the statute are severable from the preempted provisions." *Id.*[3]

Rather than following this Court's mandate and determining the extent to which the tax was invalidated by its preempted purposes, the state court focused on the wholly different question of whether the state had made improper expenditures from the Fund. In respondents' own words,

> "[t]he very starting point of analysis used by the court below was the determination by this Court that CERCLA partially preempted *the use* to which the entire Spill Act Tax would be put." (Br. in Opp. 19, emphasis added).[4]

Respondents themselves reveal the errors in this approach by conceding in the very same paragraph of their argument "that the actual expenditures made by the Spill Fund were irrelevant for the purpose of statutory construction—that is, deciding what § 114(c) meant. . . ." (*Id.*)

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[3] New Jersey suggests that, because the question of severability is "a state law issue," a petition for mandamus complaining of the New Jersey court's actions on remand is inappropriate. (Br. in Opp. 17). However, the question of whether that court conformed to the mandate is indisputably a federal question. *See Ex parte Texas*, 315 U.S. at 13. The New Jersey court misunderstood the mandate when it failed to determine whether the New Jersey tax was severable into preempted and non-preemepted components, and instead focused upon the expenditures made from the New Jersey Spill Fund.

[4] *See also id.* at 2, 6, 10, 13, 21 (referring to preempted or improper expenditures or uses).

The error of focusing upon expenditures, rather than exaction of the tax, led to the further error of dating preemption from the promulgation of the NCP and NPL, which define the permissible expenditures that can be made from the CERCLA Superfund. Had the lower court understood that it was the tax itself that was preempted, it would have been compelled to rule that preemption became effective immediately upon the enactment of CERCLA and that petitioners' rights to refunds dated from the moment that they paid a preempted tax.

The New Jersey court's error in confusing expenditures and taxes also led it to design a remedy which seeks to make the Spill Fund "whole," rather than addressing the improper exactions that have been imposed upon petitioners. The Spill Fund was already more than "whole"—it had received a windfall in the form of tax monies from petitioners resulting from a revenue measure that was, at least in part, illicit. The Legislature's transfer of additional monies into the fund would in no sense correct the State's error in collecting the tax.[5]

Finally, the State's argument (Br. in Opp. 22) that the lower court had discretion to deny petitioners a refund ignores the plain command of Section 114(c) that "[n]o person may be required to contribute to any [proscribed] fund. . . ." Only a tax refund can provide the remedy required by the statute.

3. The decision below allows the State of New Jersey to collect and retain taxes that have been preempted by act of Congress. Absent corrective action by this Court, the State will thus have accepted and acted upon the very "open invitation . . . to flout federal law" which this

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[5] Respondents claim that this Court did not decide and therefore left open questions of remedy. (Br. in Opp. 18). It did not, however, leave to the lower court the discretion to design a remedy based upon a fundamental misconception regarding both Section 114(c) and this Court's mandate.

Court, in response to the dissent's urging, explicitly declined to issue. 475 U.S. at 376.

For the foregoing reasons and those stated in the petition, a writ of mandamus should issue.

Respectfully submitted,

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